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IN THE

Supreme Court of the United States

October Term 1949

No. 130

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, a corporation,

Petitioner,

v.

JOSEPH L. GILBERT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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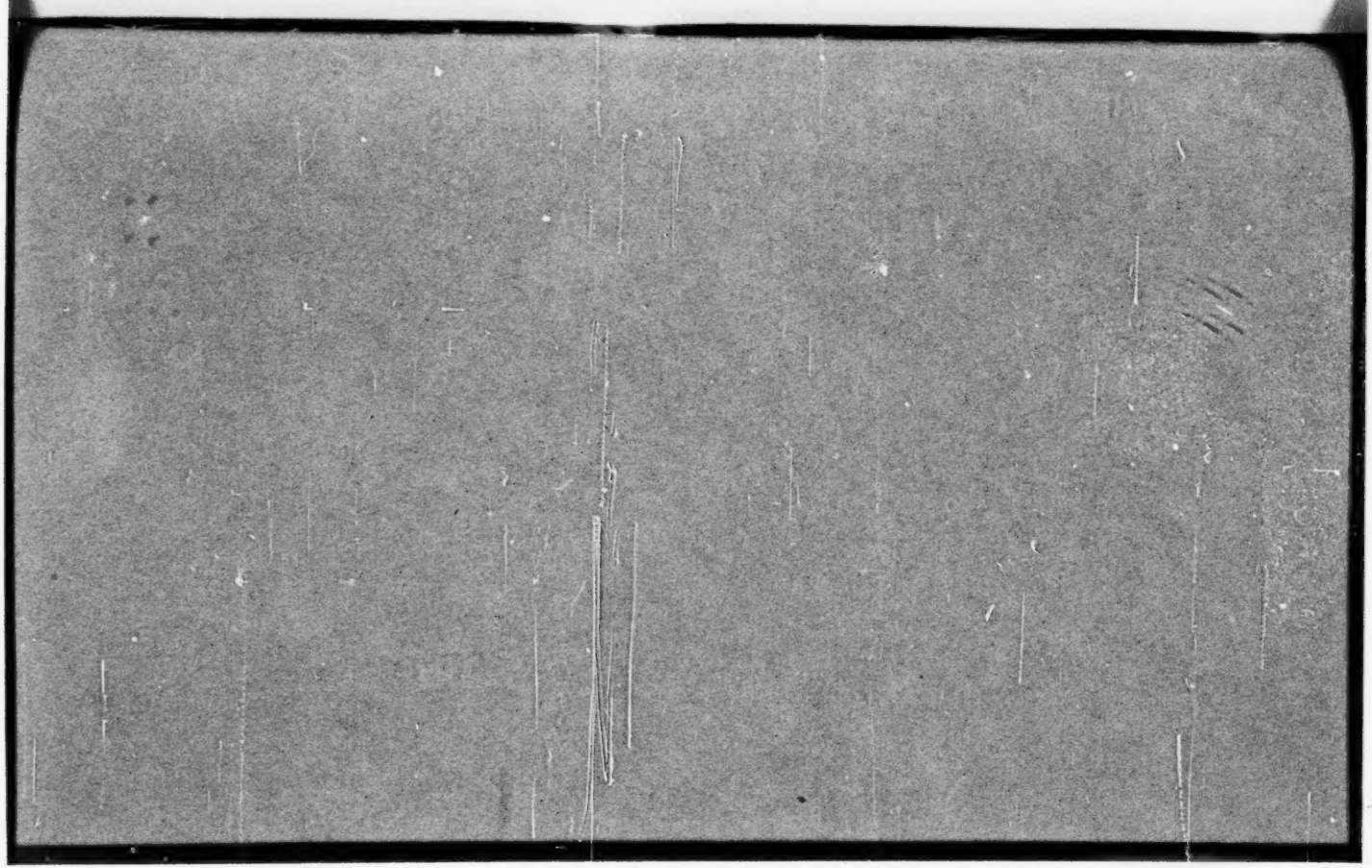

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THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, a corporation,

Petitioner,

v.

JOSEPH L. GILBERT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, a corporation, respectfully petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit directing that there be certified to this Court for determination by it that certain cause (No. 12382 in said Court of Appeals) in which petitioner was appellant and respondent herein, Joseph L. Gilbert, was appellee.

A.

Summary Statement of Matter Involved

On March 15, 1950, the United States Court of Appeals for the Ninth Circuit affirmed, by a per curiam decision, without written opinion, a judgment of the United States District Court for the District of Oregon in favor of respondent, Joseph L. Gilbert, and against petitioner, in the sum of $96,132, with costs and interest and attorneys' fees, in an action brought by respondent as beneficiary of four policies of insurance upon the life of Floyd Eaton, who was his partner in a logging business (R. 290). A petition for rehearing thereafter duly filed was denied by order entered May 10, 1950 (R. 293, 294).

Petitioner contested liability upon the ground that the insurance had been procured through misrepresentation of material objective facts as follows:

1. In written declarations to petitioner's two medical examiners, the insured answered "no" to questions asking whether he had ever had "pain around heart" (R. 61, 63, Question 6D). In response to questions (in the written declar-

ations) asking whether any physician had been consulted for advice, treatment or examination in the preceding five years, and whether he had ever had electrocardiograms made, the insured answered "yes", and in response to directions to give details, the insured told only of a pelvis fracture three years earlier and of medical treatment therefor (R. 61, 63, Questions 10 and 12). Each of the declarations was signed by the insured, and each contained the following statement: "I hereby declare that my statements and answers contained above are correctly recorded, complete and true" (R. 61, 63).

2. In the fourteen-month period immediately preceding the application for the insurance, the insured had consulted physicians because of continuing pains in his chest, over the heart area, which he first said were related to effort and which he thought might mean a heart impairment. The first physician consulted, a heart specialist, examined him, the examination including an electrocardiogram, and diagnosed the condition as angina pectoris (R. 36, 67, 69, 70, 76). (This physician died before the

action was commenced, and there was no evidence that his diagnosis was made known to the insured.)

3. Three months after this examination, the insured consulted another physician to find out whether he had heart disease or not (R. 90), without advising this physician of the prior consultation (R. 91). Because of the suspicion of heart disease, this physician referred the insured to a heart specialist in Portland, Oregon. The insured told this specialist that his pains were not related to effort. After an examination, including the making of an electrocardiogram, the specialist concluded that there was no proof of organic heart disease (R. 155, 167).

The material facts were not disputed. The insurance was applied for on March 17, 1947, approximately ten months after the last of these examinations. As part of the application the insured, Floyd Eaton, signed the two declarations to petitioner's medical examiners; copies were attached to the policies and made a part thereof (R. 10-11, 61, 63). On September 11, 1947, the insured was stricken with a coronary spasm. There were several recur-

rences, and he died on January 29, 1948, as the result of a coronary thrombosis (R. 11, 106-107, 111).

The findings of fact recognized that the insured did not disclose the facts about the medical consultations and examinations, and the making of electrocardiograms, but the Court found that the omission from the insured's declarations to petitioner's medical examiners of the fact about these consultations and examinations, and electrocardiograms, was not due to any fraud or intent to deceive petitioner or to conceal or suppress the fact that such visits were made (R. 41).

The District Court also found that the insured's statement that he had never had pain around the heart was true, because (as stated in the finding) it was not shown "that he had pains around the heart, and he did not believe that the pains in his chest were around his heart" (R. 40).

Upon these findings the District Court concluded that because of lack of proof of intent to deceive petitioner had failed to establish its defense of misrepresentation (R. 42). This was explained by two memorandum decisions which stated that intent to deceive is an essential element of the de-

fense of misrepresentation, in law actions on life insurance policies (R. 22-23).

The jurisdiction of the District Court as a court of the United States was based solely upon diversity of citizenship. Plaintiff, respondent here, is a citizen of the State of Oregon, and petitioner is a corporation organized and existing under the laws of the State of Wisconsin (R. 9-10). The judicial decisions of the State of Oregon were therefore controlling upon the questions of law involved. 28 U.S.C. Sec. 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817; *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221.

The District Court was clearly in error in rejecting petitioner's defense of misrepresentation for lack of proof of intent to deceive, in that the judicial decisions of the State of Oregon hold clearly that intent to deceive is not an essential element of the defense of misrepresentation in actions upon insurance policies. The rule of these decisions is that the failure to disclose material objective facts specifically inquired about, whether with or without an intent to deceive, constitutes misrepresentation, or legal fraud, vitiating the insurance contract. *Crisman v. State Ins. Co.*, 16 Or. 283, 18 P. 466;

Arthur v. Palatine Ins. Co., 35 Or. 27, 57 P. 62; *Mutual Life Ins. Co. v. Chandler*, 120 Or. 694, 252 P. 559; *New York Life Ins. Co. v. Yamasaki*, 159 Or. 123, 78 P. (2d) 570.

Upon appeal to the Court of Appeals for the Ninth Circuit, the failure of the District Court to recognize and apply the Oregon law was assigned as error. This was the principal issue upon which the case was submitted to the Court of Appeals (R. 281-283).

The Court of Appeals affirmed the judgment of the District Court, without opinion or statement of the reasons for its action. *The Northwestern Mutual Life Ins. Co. v. Gilbert*, 180 F. (2d) 581.

In result, the Court of Appeals has approved and adopted a ruling upon a question of controlling Oregon law that is in conflict with applicable Oregon decisions.

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B.

Basis of Jurisdiction

This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit upon certiorari under the provisions of 28 U. S. Code, Section 1254.

C.

Question Presented

The question presented is whether the Court of Appeals for the Ninth Circuit, in affirming the judgment of the District Court for the District of Oregon, has ignored or misapplied the applicable law of Oregon under which proof of intent to deceive was not an essential element of petitioner's defense of misrepresentation.

D.

Reasons for Allowance of Writ

The Court of Appeals for the Ninth Circuit has decided an important question of local law in a way which conflicts with applicable local decisions.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the

judgment of the United States Court of Appeals for the Ninth Circuit in said action and that the action be reviewed and determined by this Court, and that the judgment of the Court of Appeals for the Ninth Circuit be reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdictional Statement

This action originated in the District Court for the District of Oregon. Plaintiff, respondent here, a citizen of Oregon, sought recovery from defendant, petitioner here, a Wisconsin corporation, of the sum of one hundred thousand dollars, upon four policies of insurance on the life of Floyd Eaton, who died on January 29, 1948 (R. 2-3). An understatement of the age of the insured resulted in a reduction of the amount of insurance involved to $96,132 (R. 11).

Jurisdiction of the District Court as a court of the United States was based on diversity of citizenship under the provisions of 28 United States Code, Section 1332.

Judgment was entered in the District Court against defendant for the sum of $96,132, with costs and attorneys' fees, on September 7, 1949. The case was not officially reported (R. 44-45).

Upon appeal, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court by a per curiam decision, without written opinion.

on March 15, 1950 (R. 290). The case as offficially reported is *The Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, v.. Joseph L. Gilbert,* 180 F. (2d) 581.

Petitioner invokes the jurisdiction of this Court to review the judgment of the Court of Appeals for the Ninth Circuit under the provisions of 28 United States Code, Section 1254.

Statement of the Case

The summary statement of the petition explains the issues involved as they were presented to and ruled upon by the courts below. Petitioner's defense of misrepresentation in the applications upon which the policies of insurance were issued was rejected by the District Court because there was no direct proof that the insured, in withholding facts about a threatened heart condition and about medical consultations and examinations shortly before the insurance application, had acted fraudulently or with an intent to deceive petitioner. The Court held, in two memorandum decisions, that intent to deceive is an essential of the defense of misrepresentation in law actions on life insurance policies (R. 23-24).

Upon appeal, petitioner directed the attention to the Court to the decisions of the Supreme Court of Oregon which hold that this defense is established by proof of misstatements of material facts, or concealment of facts specifically asked for, and without proof of intent to deceive. The Court of Appeals affirmed the judgment of the District Court without explanation of its decision.

Specification of Error

The Court of Appeals erred in affirming a decision of the District Court which was in conflict with applicable Oregon decisions.

Argument

1. The Supreme Court of Oregon has held uniformly that misrepresentation of material facts in an application for insurance, whether with or without intent to deceive, makes the insurance policy unenforceable.

2. The judgment of the District Court was based upon a decision that the defense of misrepresentation in actions upon insurance policies is not established without proof of intent to deceive.

3. The Court of Appeals, in affirming the judgment of the District Court, has ignored applicable local decisions which are controlling under 28 United States Code, Section 1652, and the decisions of this Court.

1.

The Supreme Court of Oregon has uniformly adhered to the rule which prevails in most jurisdictions on the subject of misrepresentation as a defense in actions upon insurance policies. This rule is stated by text writers as follows:

2 *Cooley's Briefs on Life Insurance,* page 1166:

> "It is a well-settled rule, supported by abundant authority, that, where the insurer is induced to enter into a contract by a representation as to a material fact, the policy will be avoided, whether the misrepresentation was made wilfully, with intent to deceive, or through an innocent mistake."

Vance on Insurance, 2d ed., page 359:

> "False representations, whether innocent or fraudulent, will in all cases render a contract of insurance voidable, provided they are material . . ."

Richards on the Law of Insurance, 4th ed., page 136:

> "The misstatement (of a material fact) may have been unintentional, or through negligence, or under the honest belief that it was true, the policy nevertheless is unenforceable. Since insurance is a contract *uberrima fides,* it follows, as a matter of course, that it is based on the implied condition, that representations of material facts are true in fact."

The Oregon Supreme Court applied this rule without qualification in *Mutual Life Ins. Co. v. Chandler,* 120 Or. 694, 252 P. 559. The misrepresentation involved was like that in the case at bar; the applicant, in answering a question about prior medical consultations, had told of one only and had withheld information about others. His death was not caused by any ailment for which he had sought advice; whether or not any such ailment existed was not considered pertinent to the question for decision. This question, and the Court's answer, were stated as follows (120 Or. 700, 252 P. 561):

> "The parties were negotiating for the purpose of making a contract of insurance. Each was entitled to the exercise of the utmost good faith on the part of the other. The assured had made an offer to the company couched in certain terms. He said, in substance, 'I am a man who

has consulted only one physician whom I name and that merely for mild attacks of influenza and tonsilitis which did not prevent me from working at my usual occupation.' Possibly without wicked intention he neglected to state the names of the other physicians with whom he had consulted and who had treated him for tuberculosis. While he might have been ignorant of the existence of the disease, he was not ignorant of the fact he had consulted and taken treatment from at least one other physician. Having directly asked for it, the company had the right to know the exact truth on that subject. It was entitled to a fair offer without concealment, so that it could use its own election about accepting that offer. The record shows that this was urged as soon as it became known to the company. There is no waiver of this condition shown or pleaded on the part of the defendant. The concealment of the fact peculiarly within his knowledge that he had consulted other physicians was to stifle legitimate inquiry on the part of the insurer while the negotiation was yet in the formative stage."

The conclusion of the Court was stated in the following words (120 Or. 701, 252 P. 560):

"Under such a state of facts the very great weight of well-considered cases is to the effect that it (the failure to tell of medical consultations) amounts to legal fraud, vitiating the policy. To hold otherwise would take from any party considering an offer the right to accept or reject the same, and this too at the behest of the other party, although the latter had

> stifled investigation by the concealment of matters which would naturally challenge the consideration of the other."

Earlier Oregon decisions upheld the defense of misrepresentation, without evidence of intent to deceive, in actions on fire insurance cases. *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 P. 466; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 P. 62.

Later decisions of the Supreme Court of Oregon make clear that this rule has remained unchanged in Oregon. In two cases, decided upon other grounds, the Court noted that an innocent misrepresentation would make an insurance policy voidable. *Dolan v. Continental Casualty Co.*, 131 Or. 327, 279 P. 855, 281 P. 182; *Simmons v. Washington F. N. Ins. Co.*, 140 Or. 164, 169, 13 P. (2d) 366, 368.

2.

The judgment of the District Court was based upon findings which, after reciting that the insured had not disclosed the facts about prior medical consultations and examinations, undertook to excuse this by a finding that the failure to disclose the facts was not due to any fraud or intent to deceive

petitioner (R. 36, 41). The Court's conclusion of law was that "defendant has failed to establish any defense in this action" (R. 42). This was explained by two memoranda which stated that intent to deceive was an essential of the defense and that no such intent was proven (R. 23-24).

Apparently the Court thought that the equitable defense of misrepresentation could not be asserted in an action at law and that in Oregon the only defense available was common law deceit, with intent to deceive an essential ingredient (R. 23).

The equitable defense of misrepresentation, of which intent to deceive is not an essential, has always been available as a defense in law actions in Oregon. See *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 P. 466; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 57 P. 62; *Dolan v. Continental Casualty Co.*, 131 Or. 327, 279 P. 855, 281 P. 182, 283 P. 15, and *Simmons v. Washington F. N. Ins. Co.*, 140 Or. 164, 13 P. (2d) 366.

But if the practice in Oregon were otherwise, it is the substantive law of the state, and not its rules of procedure, that controls in diversity of citizenship actions in district courts, under the Rules of Deci-

sion Act as interpreted in *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817. The right to avoid liability upon insurance policies in such actions can only be asserted as a defense to an action upon the policies, under the Federal Rules of Procedure. See *Adamos v. New York Life Ins. Co.,* 293 U.S. 386, 55 S. Ct. 315, interpreting the Judicial Code then in effect, 28 U.S.C. Section 398.

The judgment of the District Court, based upon its rejection of petitioner's defense of misrepresentation for lack of proof of intent to deceive, is clearly in conflict with the substantive law of Oregon.

3.

The order of the Court of Appeals affirming the judgment of the District Court approved and adopted the District Court's ruling that petitioner's defense was inadequate without proof of intent to deceive. Yet in *Mutual Life Ins. Co. v. Morairty,* 178 F. (2d) 470, decided only a few months earlier, the Court reversed the District Court for the District of Arizona because that Court had not followed the Arizona law holding that misrepresentation of material facts in an application for life in-

surance will make the policy voidable, whether or not there was any attempt to deceive the insurer.

The Oregon rule on this subject is precisely the same as the Arizona rule. The Court of Appeals, in affirming a judgment against petitioner based expressly upon a misinterpretation of the Oregon law, has approved and made effective a decision which is in conflict with the local law, contrary to United States Code, Section 1652, as interpreted in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, and later cases.

No other reason appears for the affirmance of the judgment against petitioner. There were no findings against petitioner on the fact issues, except with respect to the claimed misrepresentation as to pains around the heart (R. 40). This finding was clearly against the weight of evidence, and it was obviously induced by the Court's erroneous view of the Oregon law.

But the failure to divulge the facts about consultations and examinations for heart disease was recognized by the findings. It was not classed as a misrepresentation because of findings that there was no intent to deceive (R. 41) and because the

Court erroneously concluded that intent to deceive was essential to the defense of misrepresentation.

The decision upon this question controlled the result in the District Court. The Court did not question petitioner's contentions upon other questions involved, which may be summarized briefly as follows:

(1) That the misrepresentation complained of was part of a written application, signed by the insured, with a certificate that the answers to the application questions were correctly recorded, complete and true, which application became a part of the insurance contract. This writing was binding upon respondent (in the absence of proven estoppel), and could not be contradicted or varied by parol testimony. Oregon Compiled Laws Ann., Sec. 101-506c; *Beard v. Royal Neighbors of America*, 60 Or. 41, 118 P. 171, 172; *Simmons v. Washington F. N. Ins. Co.*, 136 Or. 400, 299 P. 294, same case, 140 Or. 164, 13 P. (2d) 366.

(2) That the information withheld had been specifically asked for, both in the written questions of the application and in the form in which the questions may have been put to the insured by the

examining doctors (R. 61, 62, 199, 212). This was not a "concealment" case, that is, a concealment of facts *not* inquired about, which must be intentional to defeat the policy. (*Richards on the Law of Insurance,* 130, 132.)

(3) That the answers to the application questions purported to be complete answers, though they were in fact incomplete. Such incomplete answers are false answers. *Insurance Co. v. Raddin.* 120 U. S. 183, 7 S. Ct. 500; *Vance on Insurance,* 2d ed., 348.

(4) That the facts not divulged were objective (not matters of opinion), were known to the insured, and were material to the insurance risk involved. The materiality was not open to question under Oregon law (*Mutual Life Ins. Co. v. Chandler,* 120 Or. 694, 700, 252 P. 559, 561) and it was established by evidence (R. 181-183, 191, 192).

There was no direct finding upon the question of materiality. The District Court adopted a draft of findings submitted by respondent, after certain alterations and deletions (R. 40, 41, 42). The history of the medical consultations and examinations was given in this draft in a manner apparently de-

signed to suggest that their purpose was simply to make sure that the insured was physically fit for the work contemplated by the proposed partnership with respondent (R. 35-36). The obvious purpose was to suggest that the consultations and examinations were comparatively unimportant.

This was not the fact. The insured consulted the three doctors and was examined by two of them, both heart specialists, because he had definite symptoms of heart impairment and because he feared that he had heart disease (R. 69, 75, 91, 92, 147, 149). One of these specialists, to whom the insured said that the pains in his chest came on after exertion and radiated to both elbows (R. 69), diagnosed the condition as "clinical" angina pectoris (R. 70), meaning angina pectoris not proved by laboratory tests (R. 76).

The other specialist, who was told by the insured that the pains were not related to effort and who was not told that the pain radiated to the elbows (R. 147, 150, 163), concluded that there was "no proof of organic heart disease" (R. 167). When this specialist's attention was directed to the record of information given by the insured at the time of the earlier examination, he stated "I would not

recognize him as being the same patient, from the two complaints" (R. 155); his examination would have gone into more detail if the insured had given him the same account of his pains as that given the first specialist (R. 158).

The term "angina pectoris" describes a condition that needs investigation. It is a "symptom complex" that suggests a condition of the heart muscles and arteries, even though an electrocardiogram may show nothing abnormal (R. 77).

The importance of correct information about such symptoms to the examining doctor, and of course to a prospective insurer, is obvious (R. 155, 202). An applicant for insurance with such a medical history would not be a normal risk and could not be accepted at the standard rate, in fairness to other policyholders, because he "is not likely to live an average expectancy" (R. 185).

Upon this record, and upon the findings of the District Court, the materiality of the information withheld by the insured is beyond question. The conclusion is therefore unavoidable that the summary disposition of the case by the Court of Appeals (the order affirming the judgment was en-

tered during the afternoon of the day of the argument, R. 289-290) meant approval and adoption of the decision of the District Court. That decision was unquestionably wrong and the judgment should not be permitted to stand.

Respectfully submitted,

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